



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 696

Case No. 741: DE BRANDT-DIOSO

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Jerome Ackerman, President; Mr. Francis
Spain; Mr. Mayer Gabay;

Whereas at the request of Irma De Brandt-Dioso, a staff
member of the United Nations, the President of the Tribunal, with
the agreement of the Respondent, extended the time-limit for the
filing of an application with the Tribunal to 30 June 1993;

Whereas on 17 June 1993, the Applicant filed an application
that did not fulfil all the formal requirements of article 7 of the
Rules of the Tribunal;

Whereas, on 21 July 1993, after making the necessary
corrections, the Applicant again filed an application containing
pleas requesting the Tribunal to:

"(1) Declare that the loss of Applicant's personal
effects at Port-au-Prince occurred while she was
operating within the scope of her official United
Nations duties, and in consequence, that she is entitled
to reasonable compensation for her loss;

(2) Adopt in Applicant's case the ratio decidendi found
in Judgement No. 259 (Hoppenbrouwer) (...) to the effect
that the loss sustained by Applicant in the
Hoppenbrouwer case was attributable to service;

(3) Find that there was no negligence in the conduct of Applicant prior to, during and after the theft of the money and ring as Applicant had taken all reasonable precautions to protect the said items;

(4) Rescind the decision of the Controller, of rejecting compensation for Applicant as there was no proof of negligence, and instead, decide that Applicant is/was entitled to compensation in accordance with para. 3(a)(iii) of ST/AI/149/Rev.3 ...

(5) Order Respondent to compensate Applicant for her loss, minus the amount recovered through her personal insurance;

(6) Waive the provision of ST/AI/149/Rev.3, para. 6(b)(x) which limits the maximum compensation in the case of loss of cash to \$400.00, given the particular circumstances at the duty station ...;

(7) Fix an appropriate award of damages as compensation for pain and suffering sustained by Applicant as a result of Respondent's unjustifiable refusal to compensate her."

Whereas the Respondent filed his answer on 30 March 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 16 June 1975, as a Bilingual Clerk-Typist at the G-3 level, in the Office of Personnel Services. Her appointment was extended until 1 January 1976, when it was converted to probationary. With effect from 1 June 1977, the Applicant was granted a permanent appointment and promoted to the G-4 level. With effect from 1 January 1982, the Applicant was promoted to the G-5 level and her functional title was changed to Administrative Assistant. On 1 October 1985, she was promoted to the G-7 level and her functional title was changed to Personnel Assistant. From 23 June 1989 to 22 December 1989, the Applicant served with UNTAG in Namibia. From 18 October 1990 to 30 January 1991, she served with ONUVEH in Haiti.

According to the record, on 28 January 1991, the Applicant withdrew all the money in her account at a bank in Port-au-Prince, Haiti and cashed her mission subsistence allowance (MSA) cheques, in

anticipation of her departure from Haiti two days later. On the same day, the Applicant drove to a market area, with a local youth who accompanied her to purchase wrapping materials to ship her belongings. The Applicant stopped the car to let her passenger out to make the purchase. He left the door on the passenger's side unlocked. While the Applicant was in the vehicle, with the windows and doors closed, and the engine running, her handbag was taken from the passenger seat. Stolen from the handbag, which was found lying on the ground, was approximately US\$ 4,000 cash and a gold signet ring.

On 6 March 1991, having returned to Headquarters, the Applicant wrote to the Executive Officer, Department of Administration and Management (DAM), claiming reimbursement for the cash stolen and compensation for the gold ring, which she valued at US\$ 1,800. On 11 April 1991, the Chief, Finance and Programmes Unit (FPU), Executive Office, DAM, forwarded the claim to the Secretary of the Claims Board. On 28 June 1991, the Secretary informed the Chief, FPU, Executive Office, DAM, that on 19 June 1991 the Controller had approved the recommendation of the Board which had considered the claim, that compensation be denied. The reason for the denial was "that there was negligence on the part of the claimant and that this was a case of common theft."

In a memorandum dated 16 August 1991, the Applicant requested the Controller to reconsider the decision. She contended that "the Board did not properly take into account the local conditions and particular circumstances" of the theft. They were that only cash was generally accepted in the country, that no international bank transfers were permitted, and that cheques given by ONUVEH to its staff were negotiable only in Haiti. She was therefore forced to cash her ONUVEH cheques and close her account, which she did on the day of the theft.

In a reply dated 29 August 1991, the Deputy Controller informed the Applicant that she had requested the Secretary of the Claims Board to "ensure that your case is reviewed by the Board on the basis of the additional information provided". In two memoranda

dated 6 September 1991 and forwarded to the Deputy Controller by the Applicant on 9 September 1991, the former Chief Administrative Officer and the former Chief Civilian Personnel Officer, ONUVEH, in response to requests from the Applicant, confirmed that (a) the payment of MSA was made by checks which were negotiable only in Haiti and (b) that all ONUVEH international staff had been required to liquidate their bank accounts before leaving the country, as transfers of funds to banks in other countries were not possible.

In a letter dated 18 November 1991, the Secretary of the Claims Board communicated the decision of the Board, as approved by the Controller on 12 November 1991. He informed the Executive Officer, DAM, that the Board had considered the Applicant's claim "in the light of the statements made by ONUVEH Officers" but that it "had decided to recommend denial of the claim as in its opinion there was negligence on the part of the claimant and that it was a case of common theft." With regard to the ONUVEH procedures, "the Board could not find any new evidence of facts which would lead it to alter its previous recommendations."

In a letter dated 6 December 1991, the Applicant requested the Secretary-General to review the decision to reject her claim. On 6 February 1992, she lodged an appeal with the Joint Appeals Board (JAB). On 29 December 1992, the JAB adopted its report. Its considerations, conclusion and recommendation read, in part, as follows:

"Considerations

...

28. ..., the Panel, noting that the Claims Board advises the official designated by the Secretary-General on the action to be taken on a claim for compensation, was of the view that the reasons given by the Claims Board for its recommendation on the Appellant's claim were sufficient for their purpose. The Panel further noted that the Appellant, after having been informed of the Board's initial unfavourable recommendation on her claim, had had the opportunity to place before the Board all her arguments as to why this recommendation should be revised. Finally, the Panel was of the opinion that due process did not require staff-management participation in an

advisory body such as the Claims Board, given that staff members who felt aggrieved by a decision taken on the advice of the Claims Board could appeal, as the Appellant had done, to the Joint Appeals Board which did have staff-management participation. For these reasons, the Panel could not accept the Appellant's procedural arguments.

29. Turning to the substance of the appeal, the Panel noted that, in accordance with staff rule 106.5, staff members shall be entitled, within the limits and under the terms and conditions established by the Secretary-General, to reasonable compensation in the event of loss of their personal effects, determined to be directly attributable to the performance of official duties. The Panel further noted that the terms and conditions referred to in the above staff rule were set forth in ST/AI/149/Rev.3. Paragraph 3(a) of that instruction provides that loss of personal effects of a staff member should be deemed to be directly attributable to the performance of official duties when such loss:

'(i) Resulted as a natural incident of performing official duties on behalf of the United Nations; or

(ii) Was directly due to the presence of the staff member, in accordance with an assignment by the United Nations, in an area involving special hazards and occurred as a result of such hazards; or

(iii) Occurred as a direct result of travelling by means of transportation furnished by or at the expense or direction of the United Nations in connection with the performance of official duties.'

30. With respect to paragraph 3(a)(i) above, the Panel was of the view that the Appellant's loss had clearly not resulted as a natural incident of performing official duties. As for paragraph 3(a)(iii), in the Panel's opinion, the loss had equally clearly not occurred as a direct result of travelling by means of transportation furnished by or at the expense or direction of the United Nations. As for paragraph 3(a)(ii), the Panel seriously doubted that the loss could be said to have been directly due to the presence of the Appellant, in accordance with an assignment, in an area involving special hazards and that it had occurred as a result of such hazards. ...

31. The Panel noted that, even if ... the Appellant's loss were deemed to be directly attributable to the performance of official duties, compensation would nevertheless be precluded ... if the loss was occasioned by her negligence. After thoroughly considering the circumstances of the Appellant's

loss as described by herself, the Panel concluded that indeed her loss was occasioned by her negligence. ...

...

Conclusion and recommendation

...

34. The Panel therefore recommends that no action be taken on the appeal."

On 4 January 1993, the Director of Personnel transmitted to the Applicant a copy of the JAB report and informed her that the Secretary-General "has decided, in accordance with the Board's recommendation, to maintain the contested decision and to take no further action on your case."

On 21 July 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's entitlement to compensation is governed by staff rule 106.5 and administrative instruction ST/AI/149/Rev.3, which provide that losses directly attributable to the performance of official duties are compensable, including losses due to the presence of a staff member on assignment in an area involving special hazards. The Applicant was preparing for her departure from Haiti, which constitutes an official duty, when the theft occurred.

2. The Applicant's case is similar to the Hoppenbrouwer case (Judgement No. 259 (1980)), and could not, in accordance with the holding in this case, be classified as "negligence." The Applicant was watchful of any possible theft, and her failure to prevent the theft could have happened to the most vigilant staff member.

3. The Claims Board procedures do not provide for due process as the Claims Board does not constitute an independent and impartial tribunal; the Applicant should have been given an

opportunity to comment on the Respondent's observations before the Claims Board; and the Claims Board should have given a reasoned decision on the Applicant's claim.

Whereas the Respondent's principal contentions are:

1. The Applicant has failed to prove that her loss falls under the relevant staff rule and administrative instruction which provide for compensation for the loss of personal effects.
2. The Applicant's negligence precludes any entitlement to compensation.
3. No issues of procedural fairness exist which would vitiate the Secretary-General's decision to accept the recommendation of the Claims Board not to compensate the Applicant.

The Tribunal, having deliberated from 3 to 21 July 1995, now pronounces the following judgement:

I. The Tribunal recalls that consideration of this application was postponed at the Applicant's request so that she could have an opportunity to file written observations on the Respondent's answer. The Tribunal notes that no written observations were filed within the time-limits and therefore proceeds to consideration of the application.

II. The Applicant commenced employment with the Organization in 1975. From October 1990 to the end of January 1991, she was assigned to the United Nations Observer Group for the Verification of Elections in Haiti (ONUVEH). Towards the end of her assignment, on 28 January 1991, the Applicant withdrew, in cash, the balance of her account with a bank in Haiti. She also cashed her last mission subsistence allowance (MSA) cheques. Around 3:00 p.m., she parked the ONUVEH car which she was driving, with the engine running, in a busy market area, in Port-au-Prince. A local youth who accompanied her went to fetch wrapping materials, but apparently failed to lock

the passenger door when he left the vehicle. The doors of the car were closed, the windows up. The Applicant's handbag was placed near her on the passenger's seat. While she sat there, someone very quietly opened the door and stole her bag. The Applicant immediately left the car to seek information regarding the theft from bystanders. On the way to find a policeman she found her bag, but it was empty. The Applicant filed a theft report, declaring the following items to be missing:

- Approximately \$3,900 - \$4,000 in US currency;
- Approximately 2,000 Haitian gourdes;
- 18 carat gold man's signet ring (with a value of approximately \$US 1,800).

III. After returning to Headquarters, the Applicant filed a claim for reimbursement of her loss with the UN Headquarters Claims Board, but was denied compensation on the ground that "... there was negligence on the part of the claimant and that this was a case of common theft." The issue before the Tribunal is whether the Applicant's terms of employment were breached by the refusal of the Secretary-General to reimburse her for the loss of cash and jewellery.

IV. The Applicant requests (1) rescission of the decision of the Respondent on the grounds that she was operating within the scope of her official duties and that there was no contributory negligence on her part; (2) waiver of the limit set forth in ST/AI/149/Rev.3, which provides that the maximum compensation for loss of cash is \$400; (3) a determination that she was denied due process before the UN Claims Board; and (4) an award of damages to be fixed as compensation for pain and suffering sustained by her as a result of the Respondent's unjustifiable refusal to compensate her.

V. The Applicant's first argument is predicated on two points: She was on official business and she was not negligent when conducting it.

She bases her entitlement to compensation on staff rule 106.5 which states:

"Staff members shall be entitled, within the limits and under terms and conditions established by the Secretary-General, to reasonable compensation in the event of loss or damage to their personal effects determined to be directly attributable to the performance of official duties on behalf of the United Nations."

Administrative instruction ST/AI/149/Rev.3, issued to implement this rule, states, inter alia:

"3. (a) Without restricting the generality of the rule, loss of or damage to the personal effects of a staff member shall be deemed to be directly attributable to the performance of official duties when such loss or damage:

...

(ii) Was directly due to the presence of the staff member, in accordance with an assignment by the United Nations, in an area involving special hazards and occurred as a result of such hazards;

...

...

(b) No compensation shall be paid for any loss or damage which was occasioned by the negligence or misconduct of the claimant."

VI. The Tribunal will deal first with the question of whether the Applicant was acting within the scope of her official duties at the time of the loss. In particular, the Tribunal will examine whether there were special hazards attached to this assignment which would cause the loss to be deemed directly attributable to the performance of official duties.

It is not in dispute that when the theft occurred the Applicant was using an official ONUVEH vehicle for a purpose that was sanctioned by the Organization. She was in the process of making final travel arrangements to leave the duty station after having closed her local bank account and cashed her last MSA cheques

in accordance with ONUVEH established practice. The necessity for this procedure was subsequently confirmed by the then Chief Administrative Officer, ONUVEH, in a communication dated 6 September 1991, which stated in part:

"I can confirm that most hotels, art shops and travel agencies in Haiti generally accepted only payments in cash, and usually in US dollars. Mission subsistence allowance payments were made by cheques drawn on CITIBANK, Haiti and were negotiable only in Haiti. In addition, those personnel who opened US dollar accounts with the same bank were required to liquidate those accounts prior to departure from Haiti as direct transfers of funds to banks in other countries were not possible." (Emphasis added).

VII. The financial arrangement set up by the UN for staff members assigned to Haiti required them to close their bank accounts before leaving. Consequently, the Tribunal is satisfied that, in the circumstances of this case, it was appropriate for the Applicant to be carrying a substantial amount of cash at the time of the theft, which she would otherwise not have been carrying.

The Tribunal considers that the steps undertaken by the Applicant at the time of the theft resulted from her being assigned to Haiti. Hence, those steps were taken in connection with official duties. The Claims Board, in its recommendations, did not take sufficiently into consideration local conditions and special circumstances which placed the Applicant at a greater than normal risk.

The Respondent maintains that no special circumstances existed in Haiti and that the robbery was a matter of common theft. However, the Organization, in the ONUVEH Notes for Guidance of Election Observers, dated 23 October 1990, appears to consider that staff assigned to Haiti should exercise great caution during their stay. This indicates that this assignment was in an area involving special hazards. Paragraph 73 states:

"Election Observers are advised not only to take all possible precautions against loss or theft of their personal property but to avoid having with them in the area expensive

cameras, watches, radios or similar items, or large amounts of cash or travellers cheques."

VIII. The Tribunal agrees with the Applicant's contention that her case is similar to that of Hoppenbrouwer (Judgement No. 259 (1980)) inasmuch as her loss is not comparable to losses from thefts suffered by staff members residing in New York. In that case, one of the principal contentions of the Applicant, who succeeded in his claim for reimbursement caused by theft, was that:

"There is an obvious difference between the risks of day-to-day living and a loss sustained at an out-of-the-way place where a staff member has no business except in the line of duty."

Indeed, the then Chief Administrative Officer, ONUVEH, stated that the Applicant had suffered the loss "as a result of theft while being in a risky UN mission area."

IX. The Tribunal now turns to the question of whether the Applicant was negligent and whether she is precluded from any entitlement to compensation due to her negligence.

At the time of the theft, the Applicant was sitting in the car with the doors closed and the engine running. Her handbag was placed near her on the passenger seat. The Applicant claims that the Respondent has failed to make a case for negligence for at all times she remained in full control of the vehicle from which the theft occurred and was watchful of any possible theft. The Tribunal is of the view that the Applicant should have been more vigilant. Knowing that she was carrying a substantial amount of cash with her, she should have been more sensitive to her surroundings and made sure that once the local youth who accompanied her had left the car, the door was firmly locked. Therefore, the Tribunal believes that the Applicant was partly at fault for her loss, but, under the circumstances, it does not necessarily follow that she should be precluded from obtaining any compensation.

X. With respect to the Applicant's claim that there was a failure of due process before the Claims Board, the Tribunal rejects the Applicant's contention and agrees with the reasoning of the JAB, which considered that the requirements for a judicial hearing were not applicable to a body such as the Claims Board and that its procedures did not violate due process.

With regard to the loss of the jewellery, the Applicant is not entitled to any compensation as the administrative instruction ST/AI/149/Rev.3 plainly bars such a recovery. There is no claim cognizable thereunder, as there was no reason for the Applicant to be carrying jewellery in her purse. The Applicant also asks that the provision of administrative instruction ST/AI/149/Rev.3, paragraph 6(b)(x), which limits compensation for loss of cash to \$400, be waived. The Tribunal's view is that, due to the particular circumstances at the duty station and the special provisions regarding financial arrangements for staff assigned to Haiti, consideration should be given by the Respondent to waiver of the \$400 limit on reimbursement for cash, taking into account that the Applicant has already received some money from her insurance company.

XI. The Tribunal concludes that the Applicant is not entitled to full compensation for her loss. However, due to the particular circumstances at the duty station necessitating carrying a relatively large amount of cash, the Tribunal decides to remand the case to the Claims Board to consider whether it would be appropriate to recommend that the Organization share, in a reasonable proportion, with the Applicant, the loss of cash, taking into account the amount she received from the insurance company.

XII. In view of the foregoing, the Tribunal orders the case to be remanded to the Claims Board, as set forth in paragraph XI above.

All other pleas are rejected.

(Signatures)

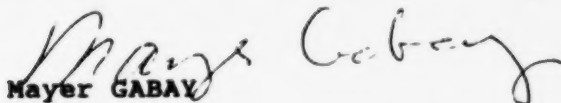
Jerome ACKERMAN
President



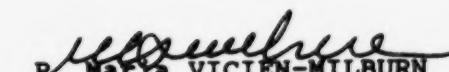
Francis SPAIN
Member

Francis Spain

Mayer GABAY
Member



Geneva, 21 July 1995



B. Maria VICIEN-MILBURN
Executive Secretary